TAY MUI CHOO

v.

EMPIRE ASSET SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[ORIGINATING SUMMONS NO: S2-24-127-1996]
20 AUGUST 1997

CONTRACT: *Sale and purchase of property - Breach - Non-payment of balance of purchase price - Whether vendor had contributed to the breach - Meaning of "contributed"*

The plaintiff was the vendor in a sale and purchase agreement wherein the 1st defendant was the purchaser of a condominium together with the accessory parcel ('the property'). A condition precedent to the contract was that the vendor had to obtain written confirmation from the developer of their consent ('the consent') to the assignment of the property to the purchaser and of the developer's undertaking that they will endorse their respective consent on the deed of novation which was executed by the vendor and purchaser. The balance of the purchase price was to be paid within three months from the date of the consent being obtained ('the completion date'), However, based on a clause in the agreement, the purchaser was given an extension of one month from the expiry of the completion date, to pay the balance in the event the purchaser had failed to settle the balance by the completion date.

Suddenly however, the plaintiff terminated the agreement through a letter dated 31 July 1995 for non-payment of the balance of the purchase price. The 1st defendant requested an extension which was granted by the plaintiff subject to certain conditions relating to the sum owing and late interests due. The 1st defendant brought to the attention of the plaintiff a clause which stated that if the purchaser's failure was caused by or contributed to by any fault on the part of the vendor, then the number of days shall be excluded from the calculation of the completion date and extended completion date. The defendants alleged that the plaintiff had failed to forward to the defendants the relevant redemption statements and letter of undertaking from the bank, and that the plaintiffs had not forwarded the relevant documents to the 1st defendant to facilitate the release of the final portion of the balance of the purchase price – thus resulting in delay, on the part of the plaintiff. As a result of such delays and omissions on the part of the plaintiff, the 1st defendant contended that it was not given sufficient time to arrange for the necessary funds to settle the final portion of the purchase price.

Held:

[1] In failing to forward to the 2nd defendant the relevant documents until at a very late date, the plaintiff had occasioned an unwarranted delay of 48 days. Those 48 days ought not to have been considered before the completion date and the extended completion date were arrived at. Therefore, the failure of the defendants to pay the balance of the purchase price was caused and/or contributed to by the fault, omission, failure and delay of the plaintiff to perform her obligations.

[2] The meaning of the word "contributed" as stated in the relevant clause in the agreement must be given its natural and ordinary meaning. The dictionary meaning of "contribute" is "to add towards a common result". The nonchalant and indifferent attitude of the plaintiff in refusing to reply to the numerous letters of the 2nd defendant either caused or at least contributed to the delay.

[3] It was totally inequitable for the plaintiff to come before this court to seek the equitable remedy of a declaration that the sale and purchase agreement entered into between the plaintiff and the 1st defendant ought to be cancelled when the plaintiff herself is guilty of inordinate and wanton delay.

[Action dismissed.]

For the plaintiff - T Thiyageswaran; M/s Thiyages, Pauline Ng & Co
For the defendants - B Subramaniam; M/s Jeyaratnam & Chong

JUDGMENT

RK Nathan JC:

Facts

The plaintiff is the vendor in a sale and purchase agreement dated 26 January 1995 wherein the 1st defendant was the purchaser of a condominium known as H.S.(M) 3561 PT 9 Section 97, Parcel 8C-6-1 Storey No: 6, Block C8, together with the accessory parcel distinguished as Accessory Parcel Nos. 47 and 48 in Block C in Sri Murni Condominium (the property). There was a condition precedent to the sale as reflected in cl. 3 which reads as follows:

> 3.1 Upon execution of this agreement, the vendor shall notify the developer of the sale of the property hereunder and obtain written confirmation from the developer of the following:

(a) the developer's consent to the assignment of the vendor's rights, title and interest under the Principal Agreement and in the property to the purchaser; and

(b) the developer's undertaking that they will endorse their respective consent on the Deed of Novation to be executed by the vendor and the purchaser hereunder

(hereinafter collectively referred to as "the consent").

Clause 5.1 provided for the balance of the purchase price to be paid within three months from the date of the consent being obtained (the completion date).

By their letter dated 6 April 1995 the 2nd defendants being the solicitors for the 1st defendant wrote to the plaintiff to the effect that since the developer's consent had been obtained by way of its letter dated 30 March 1995, therefore, pursuant to cl. 5.1 of the said agreement the 1st defendant had three months from 30 March 1995 to pay the balance of the purchase price, that is by 29 June 1995. However, cl. 5.2 gave the purchaser an extension of one month from the expiry of the completion date, to pay the balance in the event the purchaser had failed to settle the balance of the purchase price by the completion date. The extended period was therefore up to 28 July 1995 and cl. 5.3 required the purchaser, in consideration of the extension given, to pay to the vendor interest on the balance purchase price or the part thereof that remains unpaid, as the case may be, at the rate of 10% per annum calculated on daily basis from the day immediately following expiry of the completion date. By way of their letter dated 21 June 1995 the 2nd defendants forwarded to the Standard Chartered Bank on behalf of the 1st defendant a cheque for the sum of RM487,040.86 being the redemption sum as stated by the said bank in its letter dated 8 May 1995. On receipt of the redemption sum by the bank, the vendor's solicitors by way of their letter dated 7 July 1995 forwarded four copies of the receipt and reassignment to the purchaser's solicitors for the necessary execution. By way of their letter dated 21 July 1995 the 2nd defendants returned the deed of receipt and reassignment after due execution. The vendor's solicitors confirmed by their letter dated 25 July 1995 that all necessary undertakings regarding the deed had been performed and that the deed had been filed at the Kuala Lumpur High Court Registry, and the plaintiff's solicitors undertook to forward to the 2nd defendants the duly stamped and presented receipt and reassignment and the original loan agreement cum assignment. To this date the same have not been forwarded to the defendants.

Suddenly, events took a dramatic turn. The plaintiff terminated the agreement through its solicitors' letter dated 31 July 1995 for non-payment of the balance of the purchase price. Although the letter of termination had stated that the

balance had not been paid by 30 July 1995 in actual fact the extended period had expired on 28 July 1995. The said letter indicated that the vendor would arrange to settle the redemption paid by the purchaser to Standard Chartered Bank upon the purchaser returning the deed of assignment, original sale and purchase agreement between the vendor and the developer and all other relevant documents. On receipt of the letter of termination, the 1st defendant instructed the 2nd defendants to write a letter dated 2 August 1995 seeking an extension of the completion date to 31 August 1995. In response thereto the plaintiff by letter dated 17 August 1995, agreed to the said extension on the following conditions:

(a) That a sum of RM150,000 be paid by the 1st defendant to the plaintiff's solicitors on or before 25 August 1995.

(b) That interest at the rate of 10% per annum calculated on daily basis on the outstanding balance of the purchase price from 30 June 1995 to 31 August 1995 be paid by the 1st defendant to the plaintiff's solicitors on or before 25 August 1995.

On receipt of the letter dated 17 August 1995 the 1st defendant through the 2nd defendants replied by way of letter dated 28 August 1995 and raised the issue of the proviso to cl. 5.3 which was that if the purchaser's failure to pay the balance of the purchase price was caused by or contributed to by any fault, omission, failure or delay on the part of the vendor, in performing her obligation, the number of days so delayed shall be excluded from the calculation of the completion date and the extended completion date, and shall not be subjected to the late interest. The defendants alleged that in the course of performing the agreement:

(a) the vendor had failed to forward to the defendants the relevant redemption statement and undertaking letter from Standard Chartered Bank Malaysia Berhad as was requisite in the usual course of practice until 19 May 1995 notwithstanding the fact that the conditions precedent were satisfied on 30 March 1995 and that therefore there was a delay of 48 days.

(b) That on 4 July 1995 the 2nd defendants wrote to the plaintiff's solicitors for the original Deed of Receipt and Reassignment between Standard Chartered Bank Malaysia Berhad and the vendor, the original Loan Agreement between Standard Chartered Bank Malaysia Berhad and the vendor and the original Sale and Purchase Agreement between the Vendor and Murni Properties Sdn Bhd to facilitate release of the final portion of the balance purchase price and that up to that date the defendants had yet to receive the original Deed of Receipt and Reassignment and original Loan Agreement cum Assignment from the plaintiff although the 2nd defendants had received the plaintiff's undertaking to deliver the aforesaid documents to the 2nd defendants on 25 July 1995. There was thus a delay or omission on the part of the vendor of at least 21 days.

As a result of such delays and omissions on the part of the vendor, the 1st defendant contended that it was not given sufficient time to arrange for the necessary funds to settle the final portion of the purchase price. The 1st defendant demanded that the total number of days delayed be deducted from the calculation of the completion date and the extended completion date. The 1st defendant further contended that there was no inordinate delay on its part in settling the purchase price. The 1st defendant took the view that the vendor's termination of the agreement on 31 July 1995 was a wrongful repudiation of the agreement and therefore enclosed a cheque for the balance of the purchase price. However, by her solicitors' letter dated 30 August 1995 the plaintiff maintained the termination and returned the said cheque.

A director the 1st defendant affirmed an affidavit in which he exhibited various letters. On 16 February 1995 the 2nd defendants wrote to the plaintiff's solicitors requesting the latter to obtain the developer's consent early and to forward them a copy. Also exhibited was the developer's reply to the plaintiff's solicitors' letter dated 27 February 1995 giving consent but stipulating various conditions and requirements to be fulfilled by the vendor. A copy of the said letter was extended by the developer to the 2nd defendants. The 2nd defendants again wrote to the plaintiff's solicitors on 2 March 1995, drawing the latter's attention to cl. 3.5 of the agreement which reads as follows:

> 3.5 In any event the Consent must be obtained within Two (2) Months from the date hereof failing which the Purchaser may elect not to continue with this Agreement by serving a written notice of his intention to the Vendor. Within Seven (7) Days from service of the said notice, the Vendor shall refund the Deposit without interest to the Purchaser. Thereafter this Agreement shall be terminated and be of no further effect.

The 2nd defendants therefore in the said letter requested for the written confirmation that the amounts sought by way of settlement by the developer, have been paid within the said two months. There was no response to this letter. On 21 March 1995, the 2nd defendants again wrote to the plaintiff's solicitors and drawing to their attention the lack of response to their letters dated 16 February 1995 and 2 March 1995. Yet again there was no response from the plaintiff nor her solicitors. The 2nd defendants yet again by their letter dated 23 March 1995 wrote to the plaintiff's solicitors requiring the developer's written confirmation that the conditions in the developer's letter of consent dated 27 February 1995 had been fully complied with. The 2nd defendants wrote again on 6 April 1995 and on 28 April 1995 for the redemption statement. By their letter dated 13 May 1995 the plaintiff's solicitors forwarded the redemption statement and the letter of undertaking dated 8 May 1995 to forward the original loan agreement cum assignment and the sale and purchase agreement and the Receipt and Reassignment.

Court's Findings

The parties have confirmed that the action against the 2nd defendants has already been struck out with no order as to costs on 21 August 1996.

It is plain as pikestaff that the plaintiff has caused unnecessary delay. The averments of the 1st defendant have not been denied. The plaintiff submitted that the words "in the usual course of practice" as stated in the 2nd defendants' letter dated 28 August 1995 have not been clearly defined either in the sale and purchase agreement or anywhere else. The plaintiff argued that there was no time frame stipulated for the plaintiff to comply with the obligation as stated in the developer's said letter.

I reject outright this submission. Clause 3.4 of the agreement reads as follows:

> 3.4 In the event that the Consent is granted subject to any conditions to be performed on the Vendor's part, the Consent is deemed to be obtained on the Purchaser's Solicitors' receipt of a written confirmation from the Developer that the aforesaid conditions have been performed by the Vendor.

In the circumstances, in interpreting cl. 3.4, since the defendants only received the written confirmation on 30 March 1995, I must find that the consent was obtained on 30 March 1995. The phrase "in the usual course of practice" must be interpreted as intending to give effect to business efficacy. It is not in the usual course of practice for a solicitor to neither acknowledge receipt of a letter from the opposite party nor fail to reply to same. Besides the said phrase was used by the 2nd defendants. It has never been used in the said sale and purchase agreement. I accept the unchallenged evidence of the 1st defendant that by the vendor failing to forward to the 2nd defendants the relevant redemption statement and undertaking letter from Standard Chartered Bank until 13 May 1995 which letter was received by the 2nd defendants on 19 May 1995 and notwithstanding the fact that the vendor had complied with the developer's requirements on 30 March 1995, the vendor had occasioned an unwarranted delay of 48 days. Needless to say these 48 days ought not to have been considered before the completion date and the extended completion date, were arrived at. Further, since to date the plaintiff has failed to forward the original deed of receipt and reassignment and the original loan agreement cum assignment, it is my judgment that the 1st defendant can therefore well avail itself of the proviso to cl. 5.3. I therefore find that the failure of the purchaser to pay the balance purchase price was caused and/or contributed to by the fault, omission, failure and delay of the plaintiff to perform her obligations. It is pertinent to note that the proviso allows for any contributory cause on the part of the vendor for causing the delay to be considered. The

meaning of the word "contributed" as stated in the proviso to cl. 5.3 must be given its natural and ordinary meaning. The Chambers 20th Century Dictionary defines "contribute" as "to add towards a common result". Accepting that definition there is no doubt in my mind that the nonchalant and indifferent attitude of the plaintiff in refusing to reply to the numerous letters of the 2nd defendants either caused or at the least, contributed to the delay. In fact, upon receipt on 19 May 1995 of the letter dated 13 May 1995 from the plaintiff's solicitors enclosing the redemption statement and the letter of undertaking from Standard Chartered Bank, the 1st defendant by way of the 2nd defendants' letter dated 21 June 1995, paid the redemption sum and requested a stamped copy of the deed of receipt and reassignment. A reminder was sent by the 2nd defendants on 4 July 1995. By the plaintiff's solicitors' letter dated 25 July 1995 the plaintiff gave an undertaking to forward the said documents upon receipt of same.

It is totally inequitable for the plaintiff to come before this court to seek the equitable remedy of a declaration that the sale and purchase agreement entered into between the plaintiff and the 1st defendant ought to be cancelled when the plaintiff herself is guilty of inordinate and wanton delay which prevented the 1st defendant from being able to pay the balance of the purchase price according to the sale and purchase agreement.

I therefore had no hesitation in dismissing the originating summons with costs.

Reported Mariette Peters-Goh